IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 121 OF 2004

WITH

CIVIL APPLICATION NO.187 OF 2004

AND

CIVIL APPLICATION NO. 182 OF 2005

Smt. Madhavi Ramesh Dudani
2-B, Indu Park Co-op. Housing Society
Four Bungalows Road, Andheri (W),
Mumbai - 400 053. .. Appellant

V/s

Ramesh K. Dudani
C-104, Industrial Area, Phase VII,
Mohali, Near Chandigarh. .. Respondent

Mr.Amit Bhowmik for the Appellant.

Mr.H.J. Thakkar, Senior Advocate with Mr.N.N. Gunjalkar and Ms.V.N. Bangera for the Respondent.

CORAM : H.L. GOKHALE &
MRS. R.S. DALVI, JJ.

DATE OF RESERVING THE JUDGMENT : 27TH OCTOBER 2005

DATE OF PRONOUNCING THE JUDGMENT : 25TH NOVEMBER 2005

**JUDGMENT** : (per H.L. Gokhale, J.)

1. This Appeal by a wife seeks to challenge the common judgment and order dated 29th June 2004 passed by a Judge of the Family Court at Mumbai. The Appellant wife had filed Petition No.A-1822 of 1992 on 23rd

November 1992 in the Family Court seeking judicial separation under section 10 of the Hindu Marriage Act, 1955 on the ground of cruelty and ill-treatment. The Respondent husband had filed Matrimonial Suit No.B-96 of 1992 on 23rd December 1992 seeking a declaration that the purported marriage between the Appellant and the Respondent performed on 19th January 1983 be declared null and void since the Appellant was not a Hindu prior to her marriage and that she had not been converted to Hinduism any time prior to the marriage. The learned Judge of the Family Court had accepted this submission of the Respondent that the Appellant had not been converted to Hinduism prior to the marriage and, therefore, the marriage between a Hindu and a non-Hindu could not be said to be a valid marriage under section 5 of the Hindu Marriage Act, 1955. The learned Judge, therefore, held that he had no jurisdiction to try and entertain the petition filed by the Appellant wife for judicial separation or the one filed by the Respondent husband seeking a declaration of nullity of the marriage, since neither of the petitions could be said to be maintainable under the provisions of the Hindu Marriage Act. He, therefore, dismissed both the petitions by the said order which is under challenge.

2. The Respondent herein is an industrialist and a

businessman of some standing. He is stated to be an engineer and used to run a company by name Technical Products Corporation which manufactured small engineering equipments such as screws, nuts and bolts. He had a factory in MIDC, Andheri, Mumbai. He had divorced his earlier wife one Sugandha Rani some time in December 1982. He had two children; one son and one daughter from his earlier marriage. The Appellant herein was working initially as a clerk and later on in an administrative position in Respondent's company for about 5 years by the time of this divorce. She was a Catholic Christian by birth and her name was Magdhelene Pereira. Her father was a make-up artist in the film industry. The Appellant and the Respondent got married at the Markandeshwar Temple at Worli, Mumbai on 19th January 1983 according to Hindu Vedic Rites. The fact that such a marriage did take place and also that it was performed according to the Hindu Vedic Rites is not disputed by the Respondent husband. Thereafter, the parties on the same evening went to a church at Sakinaka, Mumbai, where they have undergone a church marriage.

3. Two daughters were born from this marriage; the elder one by name Ritu born on 10th December 1983 and the younger one by name Richa born on 3rd August 1986.

The parties have lived together at the bungalow of the Respondent at Indu Park Co-operative Housing Society at Four Bungalows area in Andheri (West). It appears that over the years differences developed between them and the Appellant wife has been staying away since about 7th March 1991.

4. The above referred petition for judicial separation was filed on 23rd November 1992. Prayer (a) thereof sought judicial separation, prayer (b) continuation of the custody of the minor daughters with her and prayer (c) her stridhan articles. Prayer (f) sought a partition of the matrimonial home at Indu Park so as to enable her to stay in one part thereof. Prayer (d) was an interim prayer not to sell, alienate or encumber that house and prayer (e) sought an injunction that she should not be restrained from entering into the same. Prayer (g) sought a permanent maintenance of Rs.15,000/- per month for herself and Rs.7,500/- per month for the minor daughters. Interim maintenance was sought at Rs.10,000/- to herself and Rs.5,000/- per month for the minor daughters. The Appellant took out an interim application therein making two-fold prayers. The first part of prayer was concerning the matrimonial home. Prayers (a) and (b) were to restrain the Respondent from selling, alienating or encumbering or

creating any third party rights in the above referred matrimonial home. The second part was regarding maintenance. Prayer (e) was to grant an amount of Rs.10,000/- to herself and Rs.5,000/- to each of the daughters during the pendency and disposal of the petition.

5. The Respondent filed a written statement containing a counter-claim and denied the allegations of cruelty and ill-treatment made in the petition for judicial separation. He contended that since the marriage was not between two Hindus, the Appellant could not claim any relief in the proceeding under the Hindu Marriage Act and that the court had no jurisdiction to entertain the same. Alternatively, however, he prayed that in case the court held that it had the jurisdiction, the Respondent be granted a decree of divorce for the reason that in fact he had been treated with cruelty. As far as this counter-claim is concerned, the Appellant filed her written statement thereto on 24th September 1993 and submitted that she had become a Hindu and that the court did have jurisdiction.

6. As pointed out above, the Respondent had filed the other matrimonial suit for a declaration being Suit

No.B-96 of 1992 praying that the marriage between the two be declared null and void. The Appellant filed her written statement thereto contending that she was converted to Hinduism prior to the marriage and therefore there was no question of granting any decree as prayed by him. Both the proceedings were tried together and issues were framed by the learned Judge. The relevant issues are Issue Nos.8 and 9 in Petition No.A-1822 of 1992 and Issue No.1 in Suit No.B-96 of 1992. These issues read as follows:-

> "Issue No.8:
> Does the Respondent prove that the marriage between him and the Petitioner is null and void ab-initio as on date of marriage, the Petitioner belonged to Christian Religion and was not property converted to Hinduism?
>
> Issue No.9:
> Whether the petition is maintainable, if the Petitioner is a Christian as the same is filed under the provisions of Hindu Marriage Act?
>
> Issue No.1:
> Does the Petitioner prove that the marriage

solemnised on 19.1.1983 between himself and the Respondent is null and void as the Respondent was belonging to Christian Religion on the date of marriage and no valid marriage was performed between the parties under the Hindu Marriage Act?

7. Thereafter the parties led evidence. The Appellant led her own evidence and that of one Mr.Mehta who had attended the marriage. The Respondent examined himself. The matter was argued thereafter. The learned Judge relied upon a few judgments including those of this High Court and that of Kerala High Court and came to the conclusion that since one of the parties was not Hindu, he did not have any jurisdiction to try and entertain the proceedings. It is however material to note that the evidence was recorded on all the issues arising in the matter, i.e. with respect to cruelty by either of the parties, the reasons for their separation, the allegations against each other, and their financial position to decide the question of maintenance. However, as stated above, the learned Judge held that he did not have the jurisdiction and, therefore, dismissed both the proceedings by the impugned order on that finding. He did not give any finding on the other issues. In para 28 he held that therefore the issues on cruelty, judicial separation,

maintenance and permanent alimony did not survive. It is this order which is under challenge.

8. Before we consider the arguments of the counsel for both the parties, we may refer to the findings given by the learned Judge of the Family Court. In para 21 of the impugned judgment, the learned Judge referred to the fact that in the original petition filed by wife, there was no reference to the Shudhikaran ceremony, but it was through an amendment made in May 1995 that this plea was brought on record. He has also referred to the fact that the Appellant has deposed that she performed pooja and havan on various occasions after the marriage along with the Respondent. She has not stated so in the petition as such. The learned Judge has also noted the fact that after the marriage according to the Hindu Vedic Rites, the parties went to a church for a Christian marriage. In para 22 of the judgment, he has noted that no particulars of the Shudhikaran ceremony like the date and place of performance and the witnesses present were given. He has noted that her witness Mr.Dhirubhai Mehta has stated that he witnessed the Shudhikaran ceremony though in the cross-examination, he has stated that he did not know what is meant thereby. The learned Judge has, therefore, held at the end of para

22 that she has miserably failed that she has undergone Shudhikaran ceremony.

9. With respect to her participation in various religious ceremonies as a Hindu, the learned Judge has noted that the Appellant was performing pooja, havan and various tenets of Hinduism. He has also noted that she performed pooja at the residence, factory premises and when the couple went on tour to religious places like Badrinath. She has stated that Dhirubhai Mehta accompanied them and Mr.Mehta in his statement stated that she performed pooja and havan at different places. It was submitted before the learned Judge that there was difference between performance of and participation in religious ceremonies and the learned Judge has accepted the distinction between the two in para 23 of the judgment. He has noted that performance is actually doing a particular act whereas participation does not necessarily imply doing any specific act like performing pooja or havan. He accepted that participation does not mean performance. He further noted that he had asked the Appellant to chant at least one mantra or shloka which she could not. The learned Judge, therefore, held at the end of para 23 that there was no convincing evidence to prove that she had performed pooja or havan at any time after the

marriage.

10. In para 24 of the judgment, the learned Judge has noted that the Appellant's name was changed to Madhavi after marriage and that names of her daughters were also Hindu names. However, he has declined to accept that she had been converted to Hinduism merely on the basis of such names. For that purpose he has noted that the names of her sister's children are also Hindu names such as Rakesh, Rekha and Renuka. Her visiting the religious places like Shirdi and other temples is found to be not sufficient to practice Hinduism. In para 25 of the order, the learned Judge referred to various judgments. He has, however, quoted the one of Kerala High Court in the case of **Devabalan v. Vijaykumari - 2004 (1) Civil Court Cases 424**. The Division Bench of the Kerala High Court had taken a view that where a Christian lady marries a Hindu person, children born out of that marriage are not Hindus as the children's religion is to be fixed by the religion to which the mother belongs. The main dispute in that matter was a property dispute concerning the succession of those children to the father's property. It was in this context that the Division Bench held that the marriage was not a valid marriage under the Hindu Law and the religion of the children is to be

fixed by the religion of the mother. The learned Judge is also impressed by a judgment of a Division Bench of this Court in **Neeta Desai v. Bino Samuel George - 1997 (4) ALL MR 20**. The Family Court had dismissed the wife's petition seeking decree of nullity when she had married a Christian person. The wife had come in appeal and the Division Bench held that the Family Courts Act merely created a forum. The rights between the parties are however regulated by their personal law. Since the husband was a Christian, the Hindu Marriage Act will not apply to such a marriage in view of section 2 thereof. It is a short order. There is not much of discussion with respect to the ceremonies at marriage or as to how the parties had lived after their marriage. It is also material to note that in that matter, a Hindu lady was marrying a Christian male and was going to stay in his family and not the other way round as in the present case. It is on this footing that the learned Judges had ultimately held that he did not have the jurisdiction.

11. Mr.Bhowmik, learned counsel for the Appellant, submitted that the learned Judge has ignored the evidence on record. He submitted that the marriage was performed by a priest according to the Hindu Vedic Rites. It has been amply brought on record that

sapta-padi was performed which is the legal requirement of a Hindu marriage and which is clearly placed on record. The priest has married the Appellant with her name as Madhavi to the Respondent. Mr.Dhirubhai Mehta has clearly deposed that Shudhikaran ceremony was performed though he stated that he did not know any particulars thereof, which an ordinary person may not know. He has also pointed out that the daughters' names are also Hindu names. They attended an English Medium School run by a Church, but they attended the classes of Moral Science meant for non-Catholic students. Appellant was going all over the religious places along with her husband and performing various pooja and havan at different places was also indicative. He pointed out that she had lived with the Respondent as a Hindu wife right from 1983 to 1991 until they started living separately and even thereafter she brought up the daughters as Hindu girls. At no point of time of their living together, the Respondent husband raised any such question of her alleged non-conversion and only after the Appellant filed her petition for maintenance the plea is being raised which is totally a dishonest plea and should not be countenanced.

12. Mr.Thakkar, learned senior counsel for the Respondent, on the other hand, submitted that the

submissions permissible in law to a party cannot be denied to it. In his submission, the Shudhikaran ceremony had to be performed specifically prior to the marriage. The plea of Shudhikaran having been undergone was raised by the Appellant only after an amendment and the only averment in the original petition was that the marriage was performed according to the Hindu Vedic Rites. In his submission, the evidence given in the court was at variance with what was pleaded and, therefore, the evidence of the Petitioner and that of Mr.Mehta in this behalf should be taken only with a pinch of salt. He relied upon the following judgments amongst others on Order 6 Rule 2 of the Civil Procedure Code for that purpose -

(1) Trojan & Co. v. Nagappa - AIR 1953 SC 235
(2) AIR 1975 Calcutta 118 (para 19)
(3) Rajgopal v. Kishan Gopal - AIR 2003 SC 4319
(4) Bondar Singh v. Nihal Singh - (2003) 4 SCC 161
(5) Kashi Nath v. Jaganath - (2003) 8 SCC 740

Mr.Thakkar submitted that explanation (c) to section 2(1) of the Hindu Marriage Act covers persons who are converts to Hinduism meaning thereby conversion has to be established. Under section 5 of the Act, the marriage had to be between two Hindus. Since the

conversion had not been established, in his view, the marriage could not be treated as the one over which the court would have jurisdiction. In his submission, the learned Judge was therefore right in passing the impugned order.

13. We have considered the submissions of both the counsel. It is to be noted that the Petitioner had been married by a Hindu priest and he had married her as Madhavi. Mr.Dhirubhai Mehta has given evidence with respect to Shudhikaran ceremony and the marriage. The relatives of the Appellant and the Respondent were both present at that time. The relatives of the Respondent and the priest surely knew that he could not perform a marriage of a non-Hindu to a Hindu. Mr.Mehta may not have known the exact ceremonies of Shudhikaran which an ordinary person may not know. His statement in that behalf, however, appears to be a correct statement in the natural course of events. However, we cannot attribute such an ignorance to a priest. The parents and relatives of the Appellant were present at the time of marriage. Surely, the priest would know that the Appellant is a Christian. It therefore goes without saying that he must not have performed the marriage without conversion. Section 114 of the Evidence Act expects the court to presume existence of certain facts

which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (f) of this section expects the court to presume that the common course of business has been followed in particular case and illustration (e) requires the court to presume that judicial and official acts have been regularly performed. It is, therefore, not possible to accept the submission of Mr.Thakkar that necessary condition precedent of Shudhikaran had not been performed.

14. The other evidence of the Appellant is clear in this behalf inasmuch as her daughters are given Hindu names and non-catholic instructions though they were sent to a school run by a church. They were not sent to the classes meant for the Catholic students, but were sent for studies in Moral Science. She has gone all over India along with her husband and participated in pooja, havan and various religious ceremonies. It is immaterial that she could not recite a mantra or shloka when in witness box. The fact of having lived with her husband for more than 8 years in a Hindu family clearly goes to support that she had been accepted in a Hindu family as a Hindu. The approach of

the learned Judge in this behalf is not something which can be accepted.

15. The two judgments relied upon by the learned Judge of the Family Court cannot help the Respondent. As pointed out above, the Kerala case was arising in a property matter and the one of a Division Bench of this Court was a case where the lady was married into a Christian family where the situation is exactly the converse. The facts and the propositions emerging in the two cases are clearly distinct from our case. The judgment of the Apex Court, on the other hand, in the case of **Perumal Nadar v. Ponnuswami - AIR 1971 SC 2352** is quite clear in this behalf. Annapazham, a Christian girl, married Perumal Nadar according to Hindu Rites. Thereafter she lived with him as a Hindu and had two children from him. The elder son died after his birth. The younger one by name Ponnuswami acting through his mother filed a suit for a separate possession of half share in the properties of the joint family held by father Perumal. Perumal contended that the marriage with the Christian lady was not a valid marriage. The court noted that the marriage ceremony was performed according to Hindu Rites and thereafter as per the custom sacred thali was tied by Perumal. The wife followed the Hindu custom thereafter. It was

specifically contended on behalf of the Appellant (Perumal) by his counsel as recorded in para 6 of the judgment that in the absence of any evidence to show that Annapazham was converted to Hinduism before she married Perumal, the marriage could not be considered to be a valid one. In para 9 of the judgment, the Apex Court held that the marriage had been performed in accordance with the customary ceremonies, Annapazham was accepted in the local Hindu Nadar community as belonging to Hindu religion and her husband also treated her as a Hindu. Thereafter the court held as follows:-

> "Absence of specific expiatory or purificatory ceremonies will not, in our judgment, be sufficient to hold that she was not converted to Hinduism before the marriage ceremony was performed. The fact that Perumal chose to go through the marriage ceremony according to Hindu rites with Annapazham in the presence of a large number of persons clearly indicates that he accepted that Annapazham was converted to Hinduism before the marriage ceremony was performed."

Earlier, in the same judgment in para 6, the court

observed as follows:-

> "A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion."

16. In our view, in the facts of the present case, there is no reason to take any other view. It is immaterial that the Appellant had not pleaded having undergone the Shudhikaran ceremony in the original petition and that this plea was included by an amendment later on. There is no quarrel with the propositions canvassed on the basis of Order 6 Rule 2 of C.P.C. and the judgments relied in that behalf. However, in the facts and circumstances of the case, the evidence cannot be discarded. For the reasons, which we have given earlier, her deposition and that of

Mr.Mehta quite stand to reason on the touch-stone of section 114 of the Evidence Act. Independent of their depositions, we cannot ignore that the priest would not have married a Christian lady to a Hindu person without performing the condition precedent. That apart, as held by the Apex Court, the expiatory or purification ceremony is as such not necessary. What is required is a bona fide intention to be converted into Hindu faith accompanied by consistent conduct thereafter. In the present case, both the things are clearly available. In the circumstances, we have no hesitation in upturning the finding of the Trial Court that this was not a marriage between two Hindus and that, therefore, it had no jurisdiction.

17. Mr.Thakkar referred to section 4 of the Hindu Marriage Act and submitted that any text or interpretation of Hindu Law or custom or usage prior to the commencement of Hindu Marriage Act ceases to have any effect with respect to the matter which is provided under the Act. He submitted that therefore the interpretation given in the above judgment by Justice J.C. Shah (as the Hon’ble Judge then was) will not hold the field. It is not possible to accept this submission. The judgment may be on a marriage which was performed prior to the Hindu Marriage Act coming

into force. It however lays down that for a marriage of a non-Hindu to a Hindu, an expiatory or purification ceremony is not necessary as such and absence thereof cannot lead one to hold that such a person was not converted into Hinduism prior to the marriage ceremony. The court has in terms held that the fact of a Hindu marriage, according to the Hindu Rites, in the presence of a large number of persons clearly indicates that the husband had accepted that his wife had been converted into Hinduism before the marriage ceremony (para 9 of the Apex Court judgment). Para 6 of that judgment lays down that the bona fide intention to be converted accompanied by the conduct is sufficient. This judgment would continue to govern the situation subsequent to the coming into force of the Hindu Marriage Act. Parties to the marriage have to be Hindu. The judgment lays down the test for considering as to whether one of them got converted into Hinduism at the time of the marriage. That will continue to hold the field.

18. Mr.Thakkar has relied upon a recent unreported judgment of the Apex Court in **Criminal Appeal No.399 of 2005 between Savitaben Bhatiya v. State of Gujarat decided on 10th March 2005**. That is a judgment under section 125 of Cr.P.C. and the Apex Court has held

that only legally wedded wife is entitled to maintenance. The Apex Court has relied upon the earlier judgment in **Smt. Yamunabai Adhav v. Anantrao Shivram Adhav - AIR 1988 SC 644**, and has held that principle of estoppel cannot be pressed into service to defeat the provision of section 125 of Cr.P.C. The matter before us is quite different and the question here is as to whether a lawful marriage has taken place and whether the petitions were maintainable under Hindu Marriage Act since it was claimed that it was a marriage between a Hindu and a non-Hindu and the Appellant had not been converted to Hinduism prior to the marriage. That is to be decided on the facts of the present case and the law which has been laid down by the Apex Court in Perumal Nadar (supra). This judgment on section 125 will therefore not have any application to the facts of the present case.

19. Inasmuch as the Trial Court had held that it had no jurisdiction, it had dismissed the petition of the wife for judicial separation and that of the husband seeking nullity. For the view that we have taken as above, the marriage cannot be said to be null and void. The petition filed by the husband, i.e. Matrimonial Suit No.B-96 of 1992, for declaration of nullity of the marriage will therefore have to be

dismissed.

20. As far as the petition filed by the wife is concerned, i.e. Petition No.A-1822 of 1992, it has various prayers. The first prayer was that of judicial separation on the ground of cruelty and ill-treatment. In the counter-claim filed by the husband, he had also alleged acts of cruelty on the part of the wife though he had not referred to any particular section and had submitted that in the event the court holds that it has the jurisdiction, the marriage may be dissolved by a decree of divorce. Inasmuch as the original petition filed by the wife was only for judicial separation and not for divorce, we asked the counsel for the Appellant as to whether he was interested only in judicial separation or whether he would agree for divorce. He filed an affidavit affirmed by the Appellant on 27th October 2005 stating that if appropriate maintenance for the two daughters and at least one bedroom hall kitchen flat are provided, she has no objection to the divorce being granted. Mr.Bhowmik however invoked section 13-B of the Hindu Marriage Act for divorce by mutual consent to which the Respondent’s counsel could not agree under instructions.

21. Now, as far as the relations between the

parties are concerned, they are sufficiently spoiled. The wife has pointed out various acts of cruelty and ill-treatment including physical and verbal abuse whereas the husband has pointed out that she was in the habit of siphoning off his funds in his absence. He has also alleged an incident of house-breaking after she walked out of the house. She had gone to the extent of applying for impounding his passport after she started living apart. It is alleged that she resorted to tarnishing his image by publishing their disputes in newspapers. There are number of such instances relied by both the parties and we do not think it necessary to place on record the precise particulars of these allegations. Suffice it to say that it can be said that both the parties have treated each other with such a conduct that it could be considered by the other as the acts of cruelty. Cruelty is a feeling which one forms in view of the conduct of the other party. It may consist of physical as well as mental torture. In the present case, it is quite clear that consequently the marriage between the parties is irretrievably broken down. In the circumstances, it will be of no use to confine the relief only to judicial separation provided of course appropriate arrangement is made for the Appellant wife and her daughters as sought by her. In the circumstances, instead of confining to prayer

(a) of the petition filed by the wife for judicial separation, we entertain the counter-claim filed by the Respondent husband and dissolve the marriage between the parties solemnized on 19th January 1983 by this decree of divorce on the ground of cruelty.

22. The next prayer in the petition filed by the wife was for custody of her daughters. Both of them have now become major and they are living with the Appellant. They have indicated that they intend to continue only with her. She has brought them up after she started living separately along with them. We accept their wishes. The only thing we provide is that in the event the Respondent desires to meet them, they should meet him at mutual convenience. Mr.Thakkar for the Respondent informs us that the daughters have been meeting the father from time to time and have attended to him when he was not well. We hope that this relationship between the Respondent father and the two daughters continues hereafter also.

23. Prayer (c) of the petition is for stridhan articles. It is pointed out by Mr.Thakkar that the Appellant had walked out of the house after a common friend one Advocate Choube intervened between the parties and an understanding was reduced to writing.

It is in those circumstances that she admittedly left the matrimonial home with 7 suit-cases. It has also come on record that the Appellant wife subsequently went to the extent of applying for impounding the passport of the Respondent husband. He also drew our attention to the report given by the concerned police station that there was no such stridhan remaining with the Respondent. Mr.Bhowmik for the Appellant still maintained that the stridhan articles are with the Respondent. It is not a case of a wife being thrown out of the house. May be there were altercations between the parties, but it appears that an Advocate has intervened to iron out a difficult understanding whereafter the wife has left the matrimonial home with seven suitcases. She has taken steps to safeguard her position and at one stage moved for impounding husband's passport. After an appropriate inquiry, the police have also given a report that she has not left the stridhan behind at the matrimonial home. Considering the totality of the above factors, on probabilities the inference drawn by the police appears to be correct. Her claim for the stridhan articles is therefore rejected.

24. Then remain two more prayers. Firstly for maintenance for the Appellant wife and the two

daughters and then for an appropriate house. It has come on record that immediately after the marriage, Appellant's father passed away. She had minor brothers and sisters to support at that time. In spite of that, some time in 1986 a house has been purchased in the name of her mother nearby the Respondent's house. The Appellant points out that the house is in her mother's name, but there is hardly any supporting income in the family to justify the purchase thereof considering that her father was a make-up man and had a very large family to support. The case of the Respondent is that he has contributed for the purchase of the house which appears more probable. The submission of the Respondent on that footing is that he should not be directed to contribute for a separate house to her. It is however material to note that when the parties parted in the year 1991, they entered into an MOU under which the Respondent had agreed to provide an appropriate apartment to the Appellant. It is, therefore, clear that assuming that the Respondent had contributed some good amount for the purchase of the house in the name of the Appellant's mother some time in the year 1986, when the parties parted in the year 1991 the Respondent had agreed to provide for an appropriate separate apartment for her. It is to be noted that she lived with him for over 8 years and she

lived with him as a wife of a wealthy industrialist. Therefore, the fact that he contributed to the purchase of a small flat by wife's mother (where the wife's siblings presently reside) cannot be used to deny her claim for a house.

25. It has come on record that the Respondent subsequently closed his business in Mumbai subsequent to their separation and shifted to Mohali in Chandigarh. Mr.Thakkar for the Respondent was fair enough to accept that when he disposed of his factory in MIDC, Mumbai some time in 1994-95, capital gain was about Rs.1.69 crore. Presently he does retain this Indu Park Apartment with him in Mumbai wherein his daughter from the earlier marriage (who is now married), stays with her family. During the course of this Appeal, a statement had been made by the counsel for the Respondent that the Indu Park Apartment will not be disposed of nor any third party rights will be created therein. The Appellant is keen on going to the Indu Park Apartment on being given at least one floor thereof since it is a two storey apartment. Considering however the fact that the relations between the parties are strained and the Respondent had alleged an act of house-breaking and arson by burning some of the papers, it will not be desirable that the parties or their relatives continue to live under the same

roof. However, the Appellant will have to be provided with appropriate residence befitting her status as the ex-wife of a wealthy industrialist. That cannot be wished away. That was also clear to the Respondent when he agreed in 1991 and signed the MOU to provide an apartment. In our view, the expectation of the Appellant that she should be provided with at least one bedroom hall kitchen apartment is legitimate, particularly when the two major daughters are also staying with her.

26. The Appellant is stated to be carrying on a business of a sweetmeat mart in Juhu-Parle area. She is presently staying in her mother's small flat in Andheri (West) along with her relatives. In the circumstances, it will be legitimate for her to expect that she be provided with a flat of at least 600 sq. ft. carpet area consisting of a bedroom, hall, kitchen and WC bathroom in a good housing society in Andheri (West) or Juhu-Parle area. On a rough estimate, such a flat would cost around Rs.30 lakhs. We direct the Respondent to provide such a flat to the Appellant within 3 months hereafter (or by end of February 2006) which he can certainly arrange. In the meanwhile, the statement made by the counsel for the Respondent will be converted into an injunction and the Respondent will

be restrained by an order of this court not to part with the Indu Park Bungalow or to induct any third party therein or part with possession thereof. At the end of this period of 3 months, i.e. at the end of February 2006, if the Respondent fails to provide such a flat to the Appellant, alternatively he will pay her an amount of Rs.30 lakhs to purchase such a flat. The amount will be deposited in this Court and on the Appellant entering into any such agreement for purchase of a flat, the said amount will be paid over to the vendor. The flat will be purchased in the name of the Appellant and the two daughters.

27. Then comes the prayer for maintenance. Mr.Bhowmik for the Appellant has submitted that she has gone through difficult times and she had legitimate expectation that when the matter was being disposed of, she gets proper alimony under section 25 of the Hindu Marriage Act. Mr.Thakkar for the Respondent, on the other hand, pointed out that the husband had already made sufficient provision for her. Simultaneously when the Appellant and the Respondent got married in the year 1983, the premises where the sweetmeat mart is now situated, viz. 11-A, Juhu Supreme Shopping Centre, Gulmohar Road, JVPD Scheme, was purchased. It is another matter that it is in the name of the Appellant,

but her income at the relevant time was hardly Rs.700/- p.m. and surely she could not have purchased a shop in such a posh locality. Mr.Thakkar has drawn our attention to the photographs of the shop. It is an air-conditioned shop with two air conditioners and two telephone connections. The electricity consumption, as seen from the bill for the period July 2002, was around 2500 units. At that time, the commercial rate for power consumption was Rs.4/- per unit and therefore she was spending at least Rs.10,000/- p.m. on power consumption. We have also to count the expenditure on telephones, the servants and the maintenance charges. If the fixed expenses per month are around Rs.15,000/- to Rs.20,000/-, on these counts, surely her income from the shop must be much more and at least in the range of Rs.40,000/- to Rs.50,000/-, if not more. Mr.Thakkar submitted that this has happened because of the Respondent purchasing the shop from his money though it is in the name of the Appellant. He, therefore, submits that there is no need to provide for the Appellant any more particularly when she has also acted with cruelty leading to the separation between the parties.

28. Mr.Bhowmik countered the above submission by submitting that the shop was in the name of the

Appellant and she arranged the money for its purchase by taking tuitions, etc. We have to note that her father was a make-up man in the film industry. Her siblings had hardly any income when she got married in the year 1983 and she was a young lady of about 26-28 years of age. Surely she could not have bought this shop out of her own money. There is good substance in the submission of Mr.Thakkar that when the shop was being purchased almost at the same time when the marriage took place, surely the husband must have contributed for the purchase of the shop.

29. In the circumstances, there is good substance in the submission of Mr.Thakkar that nothing additionally be provided to the Appellant wife when acts of cruelty are alleged against her also and when she is also responsible for the breaking of the marriage. In any case, she has been sufficiently provided and has good income therefrom. We have however to note that she is looking after her two daughters. The daughters are treated as "dependants" until they get married under section 21(v) of the Hindu Adoption and Maintenance Act, 1956. They are entitled to get their maintenance from their father. Considering the fact that the Appellant has been looking after these two daughters and she will be

continuing to look after them hereafter until they get married. In our view, that is a "circumstance" which has got to be considered when one decides the permanent alimony to be paid to the Appellant wife. Section 25 of the Hindu Marriage Act provides that a court exercising jurisdiction under the Act at the time of passing of the decree may direct the Respondent to pay the Applicant for her maintenance and support such gross sum or such monthly or periodical sum, having regard to the Respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just. The court is empowered that such payment may be secured by a charge on the immovable property of the Respondent. In the circumstances of the case, we have to note that the Appellant is looking after the two daughters. They have completed their education. They have become graduates in engineering and management respectively. They intend to further prosecute their studies and then get married. They do not have any income of their own. The Appellant is undoubtedly spending for their education and will spend on their marriage. It will not be proper to drive the daughters to file an application under the Hindu Adoption and Maintenance Act, 1956. In our view, the phrase "other

circumstances of the case" appearing in section 25 of the Hindu Marriage Act is quite elastic and while passing an order under that section, the necessary provision can be appropriately made if the circumstances so justify.

30. The Respondent has been made to make such payment from time to time and Mr.Thakkar has stated that he has been making additional payment for education of her daughters on his own. The fact however remains that the burden has been on the Appellant all throughout. The burden for further education and thereafter marriage is much more. They are daughters of an industrialist who are being looked after by the mother. In the circumstances, though we may not provide separately for the Appellant, considering these circumstances, we deem it just that separate provision should be made for the two daughters along with the Appellant. The provision of such an amount will take care of their future education and marriage. In our view, it will be just and appropriate that an amount of Rs.10,00,000/- is provided for each of the daughters. Such an amount shall be kept in RBI Bonds and the interest would be payable to the daughters concerned. At the present rate of 6% interest (tax free), each of them will get annually an

amount of about Rs.60,000/- which will be quite proper considering the cost of living and their status as daughters of an industrialist. In the circumstances, we direct the Respondent to invest an amount of Rs.10,00,000/- in the name of each of the daughters. That will reduce the burden on the Appellant hereafter. That will be a contribution which is expected of the Respondent as a father. He is an industrialist and quite well of. He had divorced his earlier wife. His daughter from the earlier marriage is already married and his son is an adult and is in business. He does not have any major liability. He should provide for these two daughters for their future education and marriage. Thus, though we are passing this order under section 25 of the Act, essentially we are making provision for the two daughters whose liability is otherwise on the Appellant but is being shared by the Respondent. This is to reduce her liability for the daughters and to make the Respondent share his burden of the responsibility. That takes care of the requirement for a separate accommodation and alimony. The Respondent is directed to make these deposits also within 3 months hereafter. In view of the above provision, we are not passing any order for marriage expenses though we expect the Respondent to act as a good father and share in the burden as and when the

occasion arises.

31. At the end of 3 months, i.e. by end of February 2006, if this investment of Rs.10,00,000/- in the name of each of the daughters is not made or if the flat is not made available or Rs.30,00,000/- are not deposited, it will be open to the Appellant to execute this decree for Rs.50,00,000/- by attaching and selling the Indu Park Apartment. It will be open to her, if she so intends, to get possession of the first floor of that apartment in lieu of the flat contemplated under this order.

32. The Appellant wife had taken out two Civil Applications during the course of these proceedings. The earlier one was Civil Application No.187 of 2004. Amongst others, main prayer (c) of this Civil Application was to restrain the Respondent from selling, alienating or in any way encumbering matrimonial home at 2-B, Indu Park Cooperative Housing Society. It was on this prayer that Mr.Thakkar had disputed that it was a matrimonial home, but on instructions of the Respondent, who was present in Court on 14th December 2004, had undertaken that the said premises will not be alienated in any manner nor any encumbrance will be created therein. Prayer (d) of

this Civil Application was with respect to certain properties outside the jurisdiction of this court and the same was not pressed by the Appellant's counsel. Prayers (e), (f) and (g) were with respect to certain mandatory responsibilities and medical expenses. A certain part of the payment, which was then remaining to be paid to the Appellant, was subsequently made over, i.e. an amount of Rs.45,000/- on 17th December 2004. A further amount of Rs.1,62,000/- was to be paid to the Appellant by 15th December 2005 and the same has been paid. These payments were on the basis of the amount of Rs.7,500/- which was directed to be paid by way of monthly interim maintenance with effect from 1st March 2000 under the orders of the Apex Court dated 13th March 2000 in Civil Appeal No.2001 of 2000. The above payments have been the last payments towards interim maintenance though this Civil Application has remained pending. Thereafter they were adjourned from time to time on the request of the Respondent that the Appeal itself be heard at the earliest.

33. The Appellant had taken out another Civil Application No.182 of 2005 which sought reimbursement of a payment of Rs.6,000/- towards the medical expenses incurred on daughter Richa and a sum of Rs.12,080/- towards the educational expenses and fees also of

Richa. That application was moved on 22nd August 2005. This payment has also been made.

34. As noted earlier, we have heard the main Appeal in its entirety. We have made a provision for the shelter to the Appellant and the two daughters. We have also made a separate financial arrangement for the two daughters. We have taken a view that the Appellant wife has been sufficiently provided and is capable of taking care of herself financially and hence we are not making any separate order on both these Civil Applications either for her or the two daughters. Inasmuch as the Appeal is being disposed of, these two Civil Applications also stand disposed of without any further order thereon.

35. In the circumstances, we allow this appeal and pass the following order:-

(a) The finding and the consequential impugned order on the two cross petitions passed by the Family Court dismissing both these petitions on the ground that it had no jurisdiction to entertain them is set aside. It is declared that it did have the jurisdiction to entertain them.

(b) The Petition No.B-96 of 1992 filed by the husband for declaration of nullity of the marriage is hereby dismissed.

(c) As far as Petition No.A-1822 of 1992 filed by the wife is concerned, instead of granting her prayer for judicial separation, we grant the prayer of divorce sought by the Respondent husband in his cross objection. The marriage between the two of them solemnised on 19th January 1983 shall stand dissolved by this decree of divorce.

(d) The two daughters of this marriage are both adults. They are staying with the Appellant. It will be open to the Respondent to meet them with mutual convenience.

(e) The Respondent is directed to buy a self-contained flat consisting of a sitting room, bedroom and kitchen of at least 600 sq. feet carpet area in Andheri (West) or Juhu-Vile Parle area in a good housing society in the name of the Appellant and her two daughters by the end of February 2006. In the event the

Respondent is unable to do so, he shall deposit an amount of Rs.30 lakhs in this Court by the said date and on the Appellant entering into such an agreement to purchase a flat, the amount will be paid over to the vendor.

(f) The Respondent is directed to deposit an amount of Rs.10 lakhs each in the name of the two daughters Ritu and Richa in the R.B.I. Bonds for six years and hand over the Bonds to them by end of February 2006. They will draw the six monthly interest from time to time. At the end of six years, it will be open to them to deal with the amount deposited with interest. In view of the above position, we are not providing any separate amount for marriage expenses to the daughters. The Appellant is agreeable to this arrangement on behalf of the daughters.

(g) In the meanwhile, there shall be an injunction restraining the Respondent from selling, alienating or in any way parting with or encumbering the Respondent’s bungalow at 2-B, Indu Park Cooperative Housing Society, Four Bungalows, Andheri (West), Mumbai. This amount

of Rs.50 lakhs is hereby secured by creating a charge on this property.

(h) In the event the Respondent fails to buy a house or to deposit Rs.30 lakhs and to invest the amounts in the names of the two daughters by end of February 2006 as directed, it shall be open to the Appellant to execute this decree for Rs.50 lakhs by attaching and selling the Indu Park apartment. In that, it will be open to her to get the possession of the first floor of that apartment in lieu of the flat contemplated under this order.

(i) No other and separate provision is directed in favour of the Appellant towards stridhan and all of her claims.

(j) The two civil applications stand disposed of without any further order.

(k) The Registrar General is directed to forward a copy of this order to the Secretary of the above referred Cooperative Housing Society drawing his attention to the operative part of this judgment and order and to take a note

thereof and record a change as above and obtain an acknowledgement.

(l) There shall be no order as to costs.

(H.L. GOKHALE, J.)

(MRS. R.S. DALVI, J.)

36. After the judgment was pronounced, Mr.Thakkar, Senior Counsel appearing for the Respondent, made a request that the time to comply with the above directions be extended till the end of April 2006 instead of February 2006. Mr.Bhowmik has no objection. Time to comply with the directions stands extended till April 2006.

37. Mr.Thakkar made a further request that the Respondent be given an option of giving a bank guarantee of Rs.50 lakhs, and on his giving the bank guarantee towards the liability as directed above, the injunction and the charge on the bungalow in the Indu Park Cooperative Housing Society may stand vacated. Mr.Thakkar has made this request on the instructions of the Respondent, who is present today. Mr.Bhowmik

has taken instructions from the Appellant, who is also present and has informed us that she has no objection to this arrangement. In the circumstances, the Respondent will have the option as sought above. He may give the necessary bank guarantee in favour of the Registrar General to the tune of Rs.50 lakhs drawn on a nationalised bank which will provide that in the event he fails to secure a flat of the value of Rs.30 lakhs and get the RBI Bonds worth Rs.10 lakhs each in the name of the two daughters, it will be open to the Appellant to encash the bank guarantee after 1st May 2006. A copy of this bank guarantee will be made over to the counsel appearing for the Appellant.

38. In the event of any such eventuality arising, the Appellant will be expected to buy a flat in her name and the two daughters, present the documents proposing the purchase of a flat from the vendor and on this document being tendered, the Registrar General will release the amount of Rs.30 lakhs for that purpose. Similarly, the Registrar General will invest Rs.10 lakhs each in the name of the two daughters in RBI Bonds out of the remaining amount.

39. Mr.Thakkar applies for leave to appeal against this judgment and order. The request is

rejected.

(H.L. GOKHALE, J.)

(MRS. R.S. DALVI, J.)